FEDERALLY SPEAKING

by Barry J. Lipson

Number 37

Welcome to **Federally Speaking,** an editorial column compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to keep you abreast of what is happening on the Federal scene, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a "heads ups" to Federal CLE opportunities, or other Federal legal occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 37th column. Prior columns are available on the website of the U.S. District Court for the Western District of Pennsylvania http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm.

LIBERTY'S CORNER

MELODRAMATIC SOAP OPERAS REACH HIGH COURT. "Melodramatic Soap Operas" can be defined as ongoing electronic dramas "in which the typical plot is a conflict between characters who personify extreme good and evil," with "excessively emotional acting and shallow plots and scripts." Some claim we are now entering the era of Melodramatic Soap Opera Jurisprudence. They see a series of such dramas, set against appearingly "surrealistic" backdrops, in or heading towards the **U.S. Supreme Court** mega-stage, attempting to obfuscate the real-world "realistic" backdrops which encompass the realities that: a) the **High Court** has ***only*** upheld the trial of foreigners by **Military Tribunals** ***"when authorized by Congress*** … in 'emergency situations' (***Ex Parte Quirin***, 317 U.S. 1 (1942))," and then such "**Tribunals** are only sanctioned 'from [war's] declaration until peace is declared' (see ***In re Yamashita***, 327 U.S. 1, 11-12 (1946);" see also "***Historical Prospective***," ***Federally Speaking*** No. 11; emphasis added); b) the "**War on Terrorism**," like the "**War on Saddam**" (which an ex-**Cabinet Member** now reveals was planned pre-9/11, from Day Ten of the **Bush II Administration**), and the "**War on Drugs**," is ***not*** being "fought" under a "**Congressional Declaration of War**;" and c) the **U.S. Congress** has mandated that the **Federal Government** shall not detain any **U.S. Citizen** ***"except pursuant to an Act of Congress"*** (**Non-Detention Act of 1971,** 18 U.S.C. 4001 (1); emphasis added**).** Heedless, they say, of these "real-world" backdrops, **Federal Prosecutors** have painted fantasy backdrops for such ***"Arabian Nights"*** melodramas as ***Padilla, Rasul, Al Odah, Hamdi*** and ***Bellahouel***, the current "***Soap Opera Digests"*** of which are as follows. In ***Padilla*** the **U.S. Court of Appeals for the Second Circuit** recently ruled (2-1) that the detention of Jose Padilla, an American citizen arrested at Chicago's O'Hare Airport and held as an enemy combatant, was in violation of the **Non-Detention Act** ***(Padilla v. Rumsfeld***, 2nd Cir, December 18, 2003). The **U.S. Justice Department** plans to appeal this ruling to the **High Court,** as have been other post-9/11 detention rulings. So far the **Supreme Court** has agreed, in ***Rasul v. Bush***, No. 03-334, and ***Al Odah v. United States***, No. 03-343, to adjudge "whether **American Courts** have jurisdiction to adjudicate cases filed by foreign detainees 'captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base'" leased from Cuba (see **Federally Speaking**, No. 35, ***"U.S. Supreme Court Takes On Issue Of Guantanamo Bay Detainees"),*** and in ***Hamdi v. Rumsfeld***, No. 03-6696, to adjudge the rights of a U.S citizen "captured in a zone of active combat in a foreign theater of conflict" and held as an "enemy combatant" within the United States; but has declined to pass on ***National Security Studies v. Department of Justice***, No. 03-472, which asked the soap-operatic question: "Can the Federal Government continue to withhold the names of those it has detained since 9/11 without being in violation of the Freedom of Information Act and/or the First Amendment." And now the **U.S. Solicitor General**, Theodore B. Olson, has submitted "under seal" the **Feds** response to the **High Court** in the **Habeas Corpus** appeal of ***Mohamed Kamel Bellahouel (MKB)***, an Algerian residing in Florida with his American-born wife, who was apparently

seized for being an Arabian waiter waiting on 9/11 terrorists. **MKB** seeks determinations as to the lawfulness of: a) the **Feds** secretly keeping him waiting in prison for five month without filing criminal charges, and only then releasing him on a $10,000 bond pending the outcome of the only charge against him, "letting his student visa expire;" b) the **Feds** continuing to insist that even now, when he is free and not charged with any terrorist-related acts, that strict secrecy be maintained; and c) the **U.S. District Court** and the **Eleventh Circuit** keeping secretly "off the public record" his **Habeas Corpus** files and opinions, coding them only "***M.K.B. v. Warden***, No. 03-6747" (see ***"MKB: 'Manuscript Kept Blind'," supra).*** Even if the **Solicitor General's** "secret" is that **MKB** was released as the "bait" in an Osama "rattrap," or the like, publicly so claiming secrecy after springing him, would certainly itself have prematurely "sprung the trap." A coalition of 23 legal and media organizations, including the **National Press Club** and the **People for the American Way Foundation**, have petitioned the **U.S. Supreme Court** to intervene on **MKB's** behalf in this latter cliffhanger. "We cannot 'softsoap' these **Constitutional** abrogations," they say, "without forsaking these, the ***'Days of Our Lives'."***

CHECK BOX JUSTICE: "RAGGEDY ANN" OR "ATTILA THE HUN"! (Not to be confused with **"Check Book Justice**.") The soap operas continue! The **Department of Homeland Security Bureau of Immigration and Customs Enforcement (ICE)** has "intake forms," and on these intake forms there are check boxes. And when **ICE** coldly check this box, an **automatic stay** automatically freezes all **Immigration Judges'** and **Board of Immigration Appeals' Orders** that may authorize the release from detention of such potential deportee, who thereby is now frozen in prison indefinitely pending the final outcome of his **Deportation Proceedings**. Moreover, these ***automatic stay boxes*** are ***automatically checked*** under **8 CFR 3.19 (i)(1)(2**), which was revised on October 26,2001 for the purported purpose of detaining suspected al-Qaida terrorists, and not for detaining those **"ICE** is targeting for removal" pursuant to "**Operation Predator,"** to wit, "aliens with sex offense histories." In the case of ***Alvarez v. Ashcroft***, 03-CV-5680 (DCNJ, Jan. 13, 2004), **U.S. District Court** Judge Faith Hochberg of the **District of New Jersey,** and former **U.S. Attorney for New Jersey**, expressed to the **Feds** from the **Bench** her "lack of faith" with such practice, finding it to be "wooden," standing on "quicksand," possibly a civil rights "abuse," and apparently a "breach of faith" with our **Constitution.** She took exception to "wooden decisions to use the same tool whether you're dealing with a ***Raggedy Ann*** doll or ***Attila the Hun***," noting that there was nothing indicating that **Ismael "Raggedy Ann" Alvarez**, a legal immigrant, and an engineer, homeowner, husband and father of three, was dangerous. And what was his past sin? About a decade earlier he had been caught in the act of ***consensual sex*** with a teenage girl of fifteen. ***He served no time in jail***, but was sentenced to two years probation on a guilty plea of "endangering the welfare of a child." A psychological evaluation of him at that time found that "in his culture and country of origin [El Salvador] ... it is not unusual for girls of 14 to have sex and marry at a young age," and concluded, ***"I do not feel he poses a threat to society or is, or will be, a sex offender."*** Because of this past, ***paid for in full***, offense, however, he was put and kept on ice by **ICE**, despite **Immigration Judge** Henry Dogin having authorized a $25,000 cash bond. Judge Hochberg was not persuaded that the fractured **U.S. Supreme Court** 5-4 ruling in ***Demore v. Kim,*** 538 U.S. 510 (2003), that "detention during removal proceedings is a **constitutionally** permissible part of that process," at least where there was an "aggravated felony" conviction, spoke to the **Government's** blanket exercise of discretionary detention powers, without any prior focused examination on the dangerousness and/or flight risk associated with an individual potential deportee, and the **constitutionality** of not so doing. "I have suspicions with regard to whether any discretion is being exercised **as to boxes being checked** ... on a form that was really meant for a post-9/11 time period…. I don't understand **box check-offs** in a Tier 1 [lowest level] **Megan's Law** case" (emphasis added). While **ICE** has now "thawed" the **automatic stay** freeze as to Ismael, releasing him from the cooler and mooting this litigation, reportedly there are dozens of such "soap operas" still in the judicial pipelines. In a related area, the **U.S. Circuit Court of Appeals for the Ninth Circuit** has upheld (2-1) the **Immigration Judge's** ruling that two healthy Sikh activists were entitled to the **"withholding of deportation**," reversing the **Board of Immigration Appeals,** because it "is by no means self-evident that a person engaged in extraterritorial or resistance activities [against foreign regimes]–even militant activities--is necessarily a threat to the security of the United States. … One country's terrorist can often be another country's freedom fighter," and remanding on the question of granting **asylum** (***Cheema v. INS***, No. 02-71311 (9th Cir, Dec. 1, 2003); see also ***Niam v. Ashcroft*** and ***Blagoev v. Ashcroft***, Nos. 02-4292 and 03-1115 (7th Cir, Jan. 7, 2004)). Should then there be new "check boxes:" ***Raggedy Ann /Andy*** ☐; ***Attila the Hun*** ☐***;*** or the ***Marquis de Lafayette*** ☐***?*** Check one!

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U.S. ANTITRUST LAWS REACH PRICE FIXING ABROAD. The Complaint charged "that, from 1993 through March 2002, Union Carbide [UC] and Dow, directly and through ... affiliates, compelled the plaintiffs to agree to engage in a **price maintenance conspiracy** with respect to the resale of Union Carbide products in India, and refused to accept orders or cancelled accepted orders if the prospective resale prices to end-users in India were below certain levels," so as to "ensure that prices charged by [the] plaintiffs to end-users in India for [p]roducts would not cause erosion to prices for the [p]roducts charged by [Union Carbide] and Dow to end-users ... in the United States as well as in other jurisdictions ...," whereby "[a]s a direct and proximate result of [the] [d]efendants **fixing of minimum resale prices** and other terms of sale, competition in the sale and resale of [Union Carbide] products in and from the United States was improperly diminished and restrained" (***MM Global Services v. Dow Chemical,*** DC Conn., No. 3:02cv 1107 (AVC), Sept 12, 2003). **U.S. District Court Judge** Alfred V. Covello held that this was sufficient for this **Sherman Antitrust Act** Section 1 Complaint to survive a 15 U.S.C. §6a **"Motion to Dismiss For Want of Federal Subject Matter Jurisdiction."** In rejecting defendants' **Foreign Trade and Antitrust Improvements Act** argument that the **U.S. District Court** ***lacked jurisdiction*** as there was no allegation of **price fixing** in India that had a direct, substantial and reasonably foreseeable effect on U.S. domestic commerce, he found that the Complaint alleged conduct "directed at both the foreign and domestic" markets, and a ***"per se"*** **price fixing** violation which carries with it the presumption of the required anti-competitive effect. And the genesis of this **price fixing conspiracy**? The 1984 gas leak at the UC/Dow facility in Bhopal, India, killing 3,800 people and injuring 200,000 more, which resulted in a civil damage award of $470 million; and the UC/Dow actions as to India thereafter to insulate themselves and deal there indirectly. In yours truly's experience, it is not uncommon for those who change distribution methods to try to "retain the benefits of the old, while reaping the benefits of the new." But to do so without proper prior antitrust counsel is to antitrust-wise set yourself up to "take gas".

MADRID PROTOCOL "TRADEMARKED" IN U.S.A.! By the deposition on August 1, 2003 in Geneva, Switzerland with the **World Intellectual Property Organization (WIPO)** of the accession document signed by **President Bush,** the **U.S. Patent and Trademark Office (USPTO)** joined with its counterparts in **Albania** through **Zambia**, and including **England, France, Germany, Japan** and **China** (through excluding **Canada** and **Mexico**), and obtained the ***"exclusive rights"*** to collectively initiate registration of **trademarks** from the **U.S.** with the now 61 other "**Madrid Protocolees**." The **Madrid Protocol**, formally the "**Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks of 1891**," became operative on April 1, 1996 to unfoolishly facilitate the protection of **trademark rights** throughout the world. It is "whipped" into shape by **WIPO,** the administer, and wipes out the burdens of filing worldwide up to 62 separate trademark applications. "**U.S.** participation in the **Madrid Protocol** is another sign of the growing importance that **American** businesses place on protecting their intellectual property globally," notes **Under Secretary of Commerce for Intellectual Property** James E. Rogan (a title he undoubtedly plans to **"trademark"** internationally, for as I was informed when I was "**Deputy Assistant Attorney General**," when being serviced ***before*** the "**Solicitor General**," the "longer the title the more important the person"). And the added "whip cream" on the **WIPO** marzipan? Filing with the **USPTO** in ***English*** for all such countries, paying in ***U.S. dollars***, automatic effectiveness in a designated country if not rejected within 12 to 18 months, and, oh yes, normally no need to retain multiple foreign counsel. But at what cost? The **USPTO** filing fees, of course, and a **WIPO** stipend of currently 653 Swiss Franc ($465; or $640 for color marks), plus a "little something" for each registering country, merely totaling roughly in the neighborhood of $8000 for one **trademark** in one class in each country. ***If not rejected***, surely a relatively small price to pay for worldwide **exclusive rights** to the ***Grand Title*** and ***Mark of Distinction*** "***Under Secretary of Commerce for Intellectual Property"*** (Rogan 7 words – ***President*** Bush 1), inclusive of under the Aurora Borealis in **Iceland** and "down-under" in **Australia.**

ARE ATTORNEYS' CONTINGENT FEES TAXABLE TO CLIENTS? The **Eleventh, Sixth** and **Fifth Circuits** say ***NO***; "contingency fees are income to the attorney, but ***not*** to the client" (see ***Davis v. Commissioner***, 210 F.3d 1346 (11th Cir. 2000); ***Estate of Clarks v. United States***, 202 F.3d 854 (6th Cir.

2000); and ***Cotnam v. Commissioner***, 263 F.2d 119 (5th Cir. 1959)). The **Ninth Circuit** says ***NO*** in Oregon (***Banaitis v. Commissioner***, 340 F.3d 1074 (9th Cir. 2003), but ***YES*** in Alaska (***Coady v. Commissioner***, 213 F.3d 1187 (9th Cir. 2000)) and California (***Benci-Woodward v. Commissioner***, 219 F.3d 941 (9th Cir. 2000)). The **Tenth, Seventh, Fourth, Second** and **Federal Circuit** say ***YES, "***such fees are includable in the client's gross income" and thus **Federally** taxable to the client ***(***see ***Campbell v. Commissioner***, 274 F.3d 1312 (10th Cir. 2001); ***Kenseth v. Commissioner***, 259 F.3d 881 (7th Cir. 2001); ***Young v. Commissioner***, 240 F.3d 369 (4th Cir. 2001); ***Raymond v. United States,*** No. 03-6037 (2nd Cir, January 13, 2004); ***Baylin v. United States***, 43 F.3d 1451 (Fed. Cir. 1995). A split between the Circuits? Maybe not! In ***Raymond, supra***, the **Second Circuit** speculates: "Indeed, to the extent that most **Courts** to consider the issue have indicated that the analysis of state law is determinative, this is perhaps not a true 'circuit split'" (but see ***Young, supra***; ***Banks v. Commissioner***, 345 F.3d 373 (6th Cir. 2003); and ***Srivastava v. Commissioner***, 220 F.3d 353, 363-64 (5th Cir. 2000)). Then too, the **Raymond Court** advises: "It is settled law that some recoveries, such as those for 'personal physical injuries or physical sickness,' are excluded from the definition of gross income. **26 U.S.C. § 104(a)(2);** see also ***Duse v. IBM Corp***., 252 F.3d 151, 160 (2d Cir. 2001). Raymond's recovery of lost wages does not enjoy this exclusion. … Raymond secured a judgment. He paid his attorney. The form that payment took is immaterial." But, oh, the pain of telling one's contingent fee clients, like Raymond, that ***both they and their attorney*** may have to pay taxes on ***their attorney's share*** of their non-personal injury recoveries!

FOLLOW UP

MKB: "MANUSCRIPT KEPT BLIND" (UNPUBLISHED & SEALED)!!! **Eleventh Circuit** ***MKB'ed*** its unpublished opinion in ***M.K.B. v. Warden***, No. 03-6747 [11th Cir, March 31, 2003], keeping it ***"under seal"***(see ***"Liberty's Corner: Melodramatic Soap Operas Reach U.S. Supreme Court,"*** above), and thereby denying unrelated defense counsel in ***Ochoa*** (***U.S. v. Fabio Ochoa-Vasquez*** (SD Fla., May 28, 2003)) access to this ***M.K.B.*** opinion. The ***Ochoa*** defense counsel want this ***MKB'ed*** opinion as they believe it reveals the **Eleventh Circuit's** predilections and reasoning on **Constitutional** and **secrecy** issues they say are key in their ***Ochoa*** **Eleventh Circuit** drug-related appeal (***U.S. v. Fabio Ochoa-Vasquez,*** No. 03-14400-D); access they fear the **Government** already has, "**de facto**," if not "**de juro [de jure]**." They claim entitlement on **First Amendment** and/or **Classified Information Procedures Act (CIPA)** grounds. The **CIPA** permits access to classified information by attorneys having security clearance. The **U.S. District Court for the Southern District of Florida** has also **MKB'ed** significant portions of the ***Ochoa*** drug conviction transcript, as it did to the entire file in ***M.K.B. v. Warden*** (which is now before the **U.S. Supreme Court**). Additionally, as the ***sealed M.K.B.*** opinion is also an "**unpublished opinion**," the ***Ochoa*** defense counsel have gathered certain information on **unpublished opinions** generally, which supplements our previous ***Federally Speaking*** columns, Nos. 21, 25 and 35. According to this research, in the **Fourth, Sixth** and **D.C. Circuits** "**unpublished opinions"** are given ***full precedential weight***; in the **First, Third, Fifth Eighth, Tenth** and **Eleventh Circuits** they are given ***persuasive, but not binding, precedential weight***; and in the **Second, Seventh, Ninth** and **Federal Circuits** they are given ***no precedential weight***. Moreover, this research concludes that ***only*** the **Eleventh Circuit "**restricts access" to such opinions by failing to make available database access to them and by omitting them from the **Federal Case Appendix;** and that while over four-fifths of the **Eleventh Circuit's** opinions are **unpublished**, the most of any **Circuit**, for example, nearly three-fourths of the **Seventh Circuit's** opinions are **published** (see Robel, ***Unpublished Opinion Survey***, Univ. of Indiana Law School, 2002). As previously reported in ***Federally Speaking*** No. 35, presently pending is a proposed procedural amendment to the **Federal Rules of Appellate Procedure** that would permit citation to **unpublished opinions** in all **Federal Appellate Courts.** But not if they have been ***"under seal"*** **MKB'ed!**

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